

announces a proposed administrative settlement pursuant to Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1), relating to the Slattery Gas Stove Site ("Site") in Brooklyn, Kings County, New York. This Site is not on the National Priorities List established pursuant to Section 105(a) of CERCLA. This notice is being published to inform the public of the proposed settlement and of the opportunity to comment.

The settlement, memorialized in an Administrative Cost Recovery Agreement ("Agreement"), is being entered into by EPA and Datsun Realty Corp.; J.B. Slattery & Bros., Inc.; Abraham Leser; and Solomon Obstfeld (collectively, the "Respondents"). Under the Agreement, the Respondents shall pay EPA the sum of \$95,000.00, in partial reimbursement of EPA's claim for response costs incurred with respect to the Site on or prior to November 3, 1994.

DATES: EPA will accept written comments relating to the proposed settlement on or before January 5, 1996.

ADDRESSES: Comments should be sent to: Eric Schaaf, Chief, New York/Caribbean Superfund Branch, Office of Regional Counsel, U.S. Environmental Protection Agency, 290 Broadway, 17th Floor, New York, N.Y. 10007-1866. Comments should reference the Slattery Gas Stove Site and EPA Index No. II-CERCLA-95-0208. For a copy of the Agreement, contact the individual listed below.

FOR FURTHER INFORMATION CONTACT: Juan M. Fajardo, Assistant Regional Counsel, New York/Caribbean Superfund Branch, Office of Regional Counsel, U.S. Environmental Protection Agency, 290 Broadway, 17th Floor, New York, New York, 10007-1866, telephone: (212) 637-3179.

Dated: October 30, 1995.
William Muszynski,
Acting Regional Administrator.
[FR Doc. 95-29741 Filed 12-5-95; 8:45 am]
BILLING CODE 6560-50-P

[FRL-5340-5]

Superfund Program; Final Model CERCLA Past Costs Consent Decree and Administrative Agreement

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Agency is publishing today the final "Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs" and the final "Model CERCLA Section 122(h)(1) Agreement

for Recovery of Past Response Costs." These models, developed by the Agency and the U.S. Department of Justice, provide guidance for Agency and Department staff when negotiating settlement of CERCLA Section 107 claims for recovery of purely past response costs. The model consent decree is designed for judicially-approved CERCLA Section 107 settlements, and the model agreement is designed for administrative CERCLA Section 122(h)(1) settlements. The Agency is publishing the models in their entirety, along with the September 29, 1995 joint memorandum of the EPA and the U.S. Department of Justice announcing their issuance, to inform affected members of the public of their existence and content.

FOR FURTHER INFORMATION CONTACT: Janice C. Linett, Mail Code 2272, Office of Enforcement and Compliance Assurance, Regional Enforcement Division, U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, (202) 260-7116.

Dated: October 26, 1995.

Susan Brown,
Acting Director, Office of Site Remediation Enforcement.

Memorandum

Subject: Issuance of "Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs" and "Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs"

From: Jerry Clifford, Director, Office of Site Remediation Enforcement, U.S. Environmental Protection Agency
Bruce S. Gelber, Acting Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice
To: Regional Counsel, Regions I—X
Regional Waste Management Division Directors, Regions I—X
Financial Management Officers, Regions I—X
Assistant Chiefs, Environmental Enforcement Section

September 29, 1995.

We are pleased to issue the final versions of two model CERCLA cost recovery settlement documents: 1) "Model CERCLA Section 107 Consent Decree for Recovery of Past Response Costs" ("Model CD"); and 2) "Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs"

("Model Agreement"). The Model CD is to be used as guidance for EPA and DOJ staff when negotiating CERCLA Section 107 judicial consent decrees for recovery of past response costs. The Model Agreement is to be used as guidance for EPA and DOJ staff when negotiating CERCLA Section 122(h) administrative agreements for recovery of past response costs. Both models are designed for resolution of purely past cost claims and are not intended to be used to resolve claims for future work or payment of future response costs ("cashout" settlements). Cashout settlement terms will be provided in subsequent models.

We encourage our staffs to adhere as closely as possible to the terms of these models, subject to modifications needed to reflect site-specific circumstances. We believe use of these models will reduce negotiation timeframes, achieve nationally consistent settlements, promote compliance with current settlement practices and procedures, and increase the speed of management review and approval. When seeking approval of any settlement based upon one of these models, staff should identify any significant deviation from the relevant model and the basis for the departure. For DOJ staff, these models are available electronically on the Section's work product directory, EESINDEX, as N:/NET/SS52/UDD/EESINDEX/CERMODEL/PASTCOST.CD or PASTCOST.AOC.

We would like to thank all EPA and DOJ staff who assisted in the development of these models. If you have any questions about these models, please contact Janice Linett of the Regional Support Division at (703) 978-3057 or Tom Mariani of the Environmental Enforcement Section at (202) 514-4620.

Attachments

cc: Lawrence E. Starfield, Acting Associate General Counsel, Solid Waste and Emergency Response Division.
Stephen D. Luftig, Director, Office of Emergency and Remedial Response
Jack L. Shipley, Director, Financial Management Division
Letitia Grishaw, Chief, Environmental Defense Section

Environmental Protection Agency and Department of Justice Model Cercla Section 107 Consent Decree for Recovery of Past Response Costs

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Department of Justice and the U.S.

Environmental Protection Agency. They do not constitute rulemaking by the Department or Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Department or Agency may take action at variance with this model or its internal implementing procedures.

Model Cercla Section 107 Consent Decree for Recovery of Past Response Costs

Table of Contents

- I. Background
- II. Jurisdiction
- III. Parties Bound
- IV. Definitions
- V. Reimbursement of Response Costs
- VI. Failure To Comply with Requirements of Consent Decree
- VII. Covenant Not To Sue by Plaintiff[S]
- VIII. Covenant Not To Sue by Settling Defendants
- IX. Effect of Settlement/Contribution Protection _____. [Site Access] _____. [Access to Information]
- X. Retention of Records
- XI. Notices and Submissions
- XII. Retention of Jurisdiction
- XIII. Integration/[Appendices]
- XIV. Lodging and Opportunity for Public Comment
- XV. Effective Date
- XVI. Signatories/Service

In the United States District Court for the District of [_____] [_____] Division ¹

Consent Decree

United States of America, [and the State of _____] Plaintiff[s], v. [Defendants]

Defendants.

Civil Action No. _____

Judge _____

[Note: If the complaint includes causes of action which are not resolved by this consent decree, or names defendants who are not signatories to this consent decree, the title should be "Partial Consent Decree".]

I. Background

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred and to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the [insert Site Name] in [insert City, County, State] ("the Site").

¹ Follow local rules for caption format.

[[_____] The State of _____ (the "State") also filed a complaint against the defendants in this Court alleging that the defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and [list State laws cited in the State's complaint]. The State in its complaint seeks [insert relief sought].]

B. The defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to Plaintiff[s] arising out of the transactions or occurrences alleged in the complaint[s].²

C. The United States and Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

Therefore, with the consent of the Parties to this Decree, it is Ordered, Adjudged, and Decreed:

II. Jurisdiction

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendants. Settling Defendants consent to and shall not challenge entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. Parties Bound

2. This Consent Decree is binding upon the United States [and the State], and upon Settling Defendants and their [heirs,] successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

IV. Definitions

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree

² In situations where the court has entered summary judgment as to liability, we normally should preserve that result in a subsequent settlement by deleting this Paragraph B and replacing it with one that describes the summary judgment decision.

or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

b. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

g. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).³

[[_____] "Owner Settling Defendants" shall mean [insert names].]⁴

h. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper or lower case letter.

i. "Parties" shall mean the United States, the State of _____, and the Settling Defendants.

j. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or DOJ on behalf of EPA has paid at or in connection with the Site through [insert date], plus accrued Interest on all such costs through such date.⁵

³ The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Superfund Accounting Branch, at (202) 260-6465.

⁴ This definition is needed if the optional paragraph on Notice of Obligations to Successors-in-Title is used. See *infra* p. 14.

⁵ If the past costs settlement is partial, it may be necessary to continue the definition with a brief description of the past response action(s) which are

[[____. "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the [Site or ____ operable Unit at the Site] signed on [insert date] by the Regional Administrator, EPA Region ____, or his/her delegatee, and all attachments thereto.]]

k. "Plaintiff[s]" shall mean the United States [and the State].

l. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

m. "Settling Defendants" shall mean [insert names of settling parties, or only if very numerous, "those parties identified in Appendix A."]

n. "Site" shall mean the ____ Superfund site, encompassing approximately ____ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either "depicted more clearly on the map included in Appendix B" or "designated by the following property description: ____."]

[[____. "State" shall mean the State [or Commonwealth] of ____].

[[____. "State Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, together with accrued interest, that the State of ____ has paid through [insert date] in response to the release or threatened release of hazardous substances at or in connection with the Site, but not including amounts reimbursed to the State by EPA.]]

o. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. Reimbursement of Response Costs

[Note: If the amount to be paid is \$10,000 or greater, payment should be made by electronic funds transfer using the following Paragraph 4.]

being paid for or compromised, such as: "... for the response action described in the Record of Decision for the First Operable Unit at the Site dated ____" or "for the removal action described in the action memorandum for the Site dated ____." Exercise care in describing the activities covered, as this description may affect the scope of the covenant not to sue and contribution protection. For clarity, the description of the past response action may need to indicate which response actions are not included within the definition of Past Response Costs. Check to be sure that the date used in the definition of Past Response Costs does not inadvertently include costs that are outside the scope of the definition. In some cases, it may be useful to attach a standard, Regionally-prepared cost summary listing the costs that are within the scope of the definition. This may be done: 1) to be sure that no confusion arises as to which costs are being compromised; or 2) to indicate which outstanding past cost claims are being resolved through the settlement, i.e., to indicate that the recovered costs are to be applied to particular portions of the debt.

4. *Payment of Past Response Costs to the EPA Hazardous Substance Superfund.* Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the EPA Hazardous Substance Superfund \$____ in reimbursement of Past Response Costs, plus an additional sum for Interest on that amount calculated from the date set forth in the definition of Past Response Costs through the date of payment.⁶ Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number ____, the EPA Region and Site Spill ID Number ____ [insert 4-digit number, first 2 numbers represent the Region (01-10), second 2 numbers represent the Region's Site/Spill Identification number], and DOJ Case Number _____. Payment shall be made in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney's Office in the District of ____ following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day. Settling Defendants shall send notice to EPA and DOJ that payment has been made in accordance with Section XI (Notices and Submissions) and to [insert names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

[Note: If the amount to be paid is less than \$10,000, payment should be made by check using the following alternative Paragraph 4.]

4. *Payment of Past Response Costs to the EPA Hazardous Substance Superfund.* Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the EPA Hazardous Substance Superfund \$____ in reimbursement of Past Response Costs, plus an additional sum for Interest on that amount calculated from the date set forth in the definition of Past Response Costs through the date of payment. Payment shall be made by certified check or checks or cashier's check or checks made payable to "U.S. Department of Justice," referencing the name and address of the party making payment, the EPA Region and Site Spill

⁶As an alternative to calculation and payment of interest from the Past Response Costs date through the date of payment, settling defendants may agree to place the amount agreed upon into an interest-bearing escrow account to be disbursed to EPA upon entry of the consent decree. If this method is used, accrued interest from the Past Response Costs date through the date the escrow account is created should be calculated and included in the escrow deposit.

ID Number ____ [insert 4-digit number, first 2 numbers represent the Region (01-10), second 2 numbers represent the Region's Site/Spill Identification number], USAO File Number ____, and DOJ Case Number _____. Settling Defendants shall send the check[s] to:

[Insert address of Financial Litigation Unit of U.S. Attorney's Office for the District in which the Consent Decree will be entered]

Settling Defendants shall send notice that such payment has been made to EPA and DOJ in accordance with Section XI (Notices and Submissions) and to [insert names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

[Note: If payment is to be made to a State, insert the following optional paragraph.]

[[____. *Payment of Past Response Costs to the State.* Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the State \$____, in the form of a certified check or checks or cashier's check or checks, in reimbursement of State Past Response Costs. The check[s] shall be made payable to ____ and shall reference [insert name of case]. Settling Defendants shall send the check[s] to: Insert address provided by State]]

VI. Failure to Comply With Requirements of Consent Decree

5. *Interest on Late Payments.* In the event that any payment[s] required by Section V (Reimbursement of Response Costs) or Section VI, Paragraph 6 (Stipulated Penalty), are not received when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

6. *Stipulated Penalty.*

a. If any amounts due to EPA [or to the State] under this Consent Decree are not paid by the required date, Settling Defendants shall pay to EPA [, or to the State if the delayed payment is for State Past Response Costs,] as a stipulated penalty, in addition to the Interest required by Paragraph 5, \$____ per violation per day that such payment is late. [[____. If Settling Defendants do not comply with Section ____ (Site Access), Section ____ (Access to Information), or Section ____ [insert cross-reference to any other non-payment requirements for which a stipulated penalty applies], Settling Defendants shall pay to EPA, as a stipulated penalty, \$____ per violation per day of such noncompliance.]]

[Note: Escalating payment schedules may be used in Paragraph 6(a) and in the optional

paragraph immediately above concerning stipulated penalties for violations of non-payment requirements of the consent decree.]

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA [or the State]. All payments to EPA under this Paragraph shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund" and shall be sent to: [Insert Regional Lockbox number and address]

All payments shall indicate that the payment is for stipulated penalties and shall reference the name and address of the party making payment, the EPA Region and Site Spill ID Number _____ [insert 4-digit number, first 2 numbers represent the Region (01–10), second 2 numbers represent the Region's Site/Spill Identification number], USAO File Number _____, and DOJ Case Number _____. Copies of check[s] paid pursuant to this Paragraph, and any accompanying transmittal letter[s], shall be sent to EPA and DOJ as provided in Section XI (Notices and Submissions) and to [insert title and address of Regional Financial Management Officer and any other receiving official at EPA].

[Note: If applicable, insert State payment instructions for stipulated penalties for failure to pay State Past Response Costs.]

c. Penalties shall accrue as provided in this Paragraph regardless of whether EPA [or the State] has notified Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

7. If the United States [or the State] brings an action to enforce this Consent Decree, Settling Defendants shall reimburse the United States [and the State] for all costs of such action, including but not limited to costs of attorney time.

8. Payments made under Paragraphs 5–7 shall be in addition to any other remedies or sanctions available to Plaintiff[s] by virtue of Settling Defendants' failure to comply with the requirements of this Consent Decree.

9. The obligations of Settling Defendants to pay amounts owed the United States [and the State] under this Consent Decree are joint and several. In the event of the failure of any one or more Settling Defendants to make the

payments required under this Consent Decree, the remaining Settling Defendants shall be responsible for such payments.

10. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree.

VII. Covenant Not to Sue By Plaintiff[S]

11. *Covenant Not to Sue by United States.* Except as specifically provided in Paragraph 12 (Reservation of Rights by United States), the United States covenants not to sue Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant not to sue shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 4 (Payment of Past Response Costs to the United States) and Section VI, Paragraphs 5 (Interest on Late Payments) and 6(a) (Stipulated Penalty for Late Payment). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

12. *Reservation of Rights by United States.* The covenant not to sue set forth in Paragraph 11 does not pertain to any matters other than those expressly specified therein. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters, including but not limited to:

a. liability for failure of Settling Defendants to meet a requirement of this Consent Decree;

b. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

c. criminal liability;

d. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 6906; and

e. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs.

[Note: If the State is a co-plaintiff, insert separate paragraphs for the State's covenant not to sue settling defendants and reservation of rights.]

VIII. Covenant Not to Sue By Settling Defendants

13. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States [or the State], or its [their] contractors or employees, with respect to Past Response Costs [and State Response Costs] or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at the Site for which the Past Response Costs were incurred; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.⁷

14. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

IX. Effect of Settlement/Contribution Protection

15. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

16. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants are entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in

⁷ The settlement should, wherever possible, release or resolve any claims by settling defendants against the United States related to the site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Settlement of any federal liability will require additional revisions to this document, and model language will be provided separately. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be deleted and private parties be allowed to reserve their rights.

this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs.⁸

17. Each Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ [and the State] in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ [and the State] in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Defendant shall notify EPA and DOJ [and the State] within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

18. In any subsequent administrative or judicial proceeding initiated by the United States [or the State] for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States [or the State] in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff[s] set forth in Section VII.

[____. Site Access]⁹

[[____. Commencing upon the date of lodging of this Consent Decree, Settling Defendants agree to provide the United States [, the State,] and its [their] representatives, including EPA and its contractors, access at all reasonable times to the Site and to any other property owned or controlled by Settling Defendants to which access is determined by EPA [or the State] to be required for the implementation of this Consent Decree, or for the purpose of

conducting any response activity related to the Site, including but not limited to:

- a. Monitoring of investigation, removal, remedial or other activities at the Site;
- b. Verifying any data or information submitted to the United States [or the State];
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing response actions at or near the Site; [and]
- f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section ____ (Access to Information).

[Note: If institutional controls or any other provisions requiring monitoring are included in the decree, also include the following subparagraph g.]

[g. Assessing Settling Defendants' compliance with this Consent Decree.] _____. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its [their] access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Resource Conservation and Recovery Act, 42 U.S.C. § 6927, and any other applicable statutes or regulations.

_____. Notice of Obligations to Successors-in-Title.

a. Within 15 days after entry of this Consent Decree, [Owner Settling Defendants] shall record [insert either "a certified copy of this Consent Decree" or "a notice of the entry of this Consent Decree"] with the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State of _____.¹⁰ Thereafter, each deed, title, or other instrument conveying an interest in the property included in the Site shall contain a notice stating that the property is subject to this Consent Decree [and any lien retained by the United States] and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree.

b. The obligations of each [Owner Settling Defendant] with respect to the provision of access under Section ____ (Site Access) [and the implementation of institutional controls under Paragraph ____] shall be binding upon

¹⁰ If an institutional controls provision is included in this section, this paragraph should be amended to require the owner settling defendants to record in the chain of title a restrictive covenant that specifies the institutional controls. The institutional controls to be implemented should be described in an appendix to this decree.

any and all Settling Defendants and upon any and all persons who subsequently acquire any such interest or portion thereof (hereinafter "Successors-in-Title"). Within 15 days after the entry of this Consent Decree, each [Owner Settling Defendant] shall record at the Recorder's Office [or Registry of Deeds or other appropriate office where land ownership and transfer records are maintained for the property] a notice of obligation to provide access under Section ____ (Site Access) and related covenants, if any. Each subsequent instrument conveying an interest to any such property included in the Site shall reference the recorded location of such notice and covenants applicable to the property.

c. Any [Owner Settling Defendant] and any Successor-in-Title shall, at least 30 days prior to the conveyance of any such interest, give written notice of this Consent Decree to the grantee and written notice to EPA [and the State] of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree was given to the grantee. In the event of any such conveyance, the Settling Defendants' obligations under this Consent Decree, including their obligation to provide or secure access pursuant to Section ____ (Site Access), shall continue to be met by Settling Defendants. In no event shall the conveyance of an interest in property that includes, or is a portion of, the Site release or otherwise affect the liability of Settling Defendants to comply with this Consent Decree.]]

[____. Access to Information¹¹]

[____. Settling Defendants shall provide to EPA [and the State], upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site [or to the implementation of this Consent Decree], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

[____. Confidential Business Information and Privileged Documents.

a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff[s]

¹¹ Include this section only if settling defendants have been or will be involved in cleanup efforts at the site or if they may possess information which may assist the Agency in its cleanup or enforcement efforts.

⁸ In exceptional situations, different coverage may apply.

⁹ Include this section if 1) access to the site is needed and 2) the site owner is a settling defendant or other settling defendants control access to the site or to any other property to which access is needed. Renumber sections and paragraphs as necessary. If any of the settling defendants will need to provide institutional controls as part of any response action, include such a provision within this section and change the name of this section to Site Access/Institutional Controls.

under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Documents or information determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA [and the State], or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendants.

b. Settling Defendants may assert that certain documents, records or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege in lieu of providing documents, they shall provide Plaintiff[s] with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports or other information created or generated pursuant to the requirements of this or any other consent decree with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff[s] in redacted form to mask the privileged information only. Settling Defendants shall retain all records and documents that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor.

____. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.]]

X. Retention of Records¹²

19. Until ____ years after the entry of this Consent Decree, each Settling

Defendant shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

20. After the conclusion of the document retention period in the preceding paragraph, Settling Defendants shall notify EPA and DOJ [and the State] at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or DOJ [or the State], Settling Defendants shall deliver any such records or documents to EPA [or the State]. Settling Defendants may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege, they shall provide Plaintiff[s] with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other consent decree with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff[s] in redacted form to mask the privileged information only. Settling Defendants shall retain all records and documents that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor.

21. By signing this Consent Decree, each Settling Defendant certifies individually that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which

of the optional sections on Site Access or Access to Information is included.

relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site, after notification of potential liability or the filing of a suit against the Settling Defendant regarding the Site; and

c. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e) [insert, if applicable, “, and Section 3007 of RCRA, 42 U.S.C. § 6927”].

XI. Notices and Submissions

22. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, [the State,] and Settling Defendants, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement
Section, Environment and Natural
Resources Division, U.S. Department
of Justice (DJ # _____), P.O. Box
7611, Washington, D.C. 20044-7611

As to EPA:

[Insert names and addresses of EPA
Regional contacts, usually the ORC
attorney and the RPM or Project
Coordinator]

[As to the State:

Insert name and address of State contact
if the State is a party to the Consent
Decree]

As to Settling Defendants:

[Insert name of one person who will
serve as the contact for all Settling
Defendants]

XII. Retention of Jurisdiction

23. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

¹² Renumber this section and all following section headings and paragraph numbers if either

XIII. Integration/[Appendices]

24. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. [The following appendices are attached to and incorporated into this Consent Decree: "Appendix A" is the complete list of Settling Defendants; and "Appendix B" is the map of the Site.]

XIV. Lodging and Opportunity for Public Comment

25. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

26. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XV. Effective Date

27. The effective date of this Consent Decree shall be the date upon which it is entered by the Court.

XVI. Signatories/Service

28. Each undersigned representative of a Settling Defendant to this Consent Decree and the [Assistant Attorney General for the Environment and Natural Resources Division]¹³ of the United States Department of Justice [insert State official] certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

29. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent

Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

30. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

So ordered this _____ day of _____, 19____.

United States District Judge

The Undersigned parties enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

For the United States of America
Date: _____

[Name] Assistant Attorney General¹⁴
Environment and Natural Resources
Division, U.S. Department of Justice,
Washington, D.C. 20530

[Name] United States Attorney [Address]

[Name] Attorney, Environmental
Enforcement Section, Environment and
Natural Resources Division, U.S.
Department of Justice, P.O. Box 7611,
Washington, DC 20044-7611

[Name]¹⁵ Assistant Administrator for
Enforcement and Compliance Assurance,
U.S. Environmental Protection Agency,
401 M Street S.W., Washington, D.C.
20460

[Name] Regional Administrator, Region [____], U.S. Environmental Protection Agency,
[Address]

[Name] Assistant Regional Counsel, U.S.
Environmental Protection Agency,
[Address]

[[The undersigned party enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

For the State of [____]

Date: _____

[Names and addresses of State signatories]
The undersigned party enters into this Consent Decree in the matter of [insert case

¹⁴ See *supra* n. 13.

¹⁵ Include AA-OECA signature block only if he or she has a concurrence role under Delegation No. 14-13-B.

name and civil action number], relating to the _____ Superfund Site.

For Defendant [____]

Date: _____

[Names and address of Defendant's signatories]

Agent Authorized to Accept Service on
Behalf of Above-signed Party:

Name: _____

Title: _____

Address: _____

Environmental Protection Agency
Model CERCLA Section 122(h)(1)
Agreement for Recovery of Past
Response Costs

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

Model CERCLA Section 122(h)(1) Agreement
for Recovery of Past Response Costs

Table of Contents

- I. Jurisdiction
- II. Background
- III. Parties Bound
- IV. Definitions
- V. Reimbursement of Response Costs
- VI. Failure To Comply With Agreement
- VII. Covenant Not To Sue by EPA
- VIII. Reservations of Rights by EPA
- IX. Covenant Not To Sue by Settling Parties
- X. Effect of Settlement/Contribution Protection
- XI. Retention of Records
- XII. Notices and Submissions
- XIII. Integration/[Appendices]
- XIV. Public Comment
- ____. [Attorney General Approval]
- XV. Effective Date

I. Jurisdiction

In the matter of: [Site Name] [City, County, State] [Names of Settling Parties] Settling Parties

Agreement for Recovery of Past Response Costs

U.S. EPA Region _____

CERCLA Docket No. _____

Proceeding Under Section 122(h)(1) of
CERCLA 42 U.S.C. § 9622(h)(1)

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority

¹³ Substitute Chief, Environmental Enforcement Section, where the case involves less than \$1 million and at least \$500,000 is being recovered by settlement. Note also that Associate Attorney General approval is required if the difference between the total amount of the claim and the amount of the settlement exceeds \$2 million or 15% of claim (whichever is greater). See 28 CFR 0.160.

has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D.

[Note: Also reference any internal Regional redelegations of authority under 14-14-D.]

2. This Agreement is made and entered into by EPA and the [insert names or reference attached appendix listing settling parties] ("Settling Parties"). Each Settling Party consents to and will not contest EPA's jurisdiction to enter into this Agreement or to implement or enforce its terms.

II. Background

3. This Agreement concerns the [insert Site name] ("Site") located in [insert Site location]. EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

[Note: A brief description of the release or threatened release and of the response actions undertaken may be included.]

5. In performing this response action, EPA incurred response costs at or in connection with the Site.

6. EPA alleges that Settling Parties are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred at or in connection with the Site.

[Note: If Attorney General approval is not required for this settlement because total past and projected response costs of the United States at the site are not expected to exceed \$500,000, excluding interest, insert the following paragraph and renumber all subsequent paragraphs.]

[_____. The Regional Administrator of EPA Region _____, or his/her delegatee, has determined that the total past and projected response costs of the United States at or in connection with the Site will not exceed \$500,000, excluding interest.]

7. EPA and Settling Parties desire to resolve Settling Parties' alleged civil liability for Past Response Costs without litigation and without the admission or adjudication of any issue of fact or law.

III. Parties Bound

8. This Agreement shall be binding upon EPA and upon Settling Parties and their [heirs], successors and assigns. Any change in ownership or corporate or other legal status of a Settling Party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such

Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. Definitions

9. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

e. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).¹

f. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and the Settling Parties.

h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site through [insert date], plus accrued Interest on all such costs through such date.²

¹ The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Superfund Accounting Branch, at (202) 260-6465.

² If the past costs settlement is partial, it may be necessary to continue the definition with a brief

i. "Section" shall mean a portion of this Agreement identified by a roman numeral.

j. "Settling Parties" shall mean [insert names of settling parties, or if very numerous, "those parties identified in Appendix _____."]

k. "Site" shall mean the _____ Superfund site, encompassing approximately _____ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either "depicted more clearly on the map included in Appendix _____" or "designated by the following property description: _____."]

l. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. Reimbursement of Response Costs

10. Within 30 days of the effective date of this Agreement, the Settling Parties shall pay to the EPA Hazardous Substance Superfund \$_____ in reimbursement of Past Response Costs, plus an additional sum for Interest on that amount calculated from the date set forth in the definition of Past Response Costs through the date of payment.³

11. Payments shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." Each check shall reference the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number _____ [insert 4-digit number, first 2

description of the past response action(s) which are being paid for or compromised, such as: "... for the response action described in the Record of Decision for the First Operable Unit at the Site dated _____" or "for the removal action described in the action memorandum for the Site dated _____." Exercise care in describing the activities covered, as this description may affect the scope of the covenant not to sue and contribution protection. For clarity, the description of the past response action may need to indicate which response actions are not included within the definition of Past Response Costs. Check to be sure that the date used in the definition of Past Response Costs does not inadvertently include costs that are outside the scope of the definition. In some cases, it may be useful to attach a standard, Regionally-prepared cost summary listing the costs that are within the scope of the definition. This may be done: 1) to be sure that no confusion arises as to which costs are being compromised; or 2) to indicate which outstanding past cost claims are being resolved through the settlement, *i.e.*, to indicate that the recovered costs are to be applied to particular portions of the debt.

³ As an alternative to calculation and payment of interest from the Past Response Costs date through the date of payment, settling parties may agree to place the amount agreed upon into an interest-bearing escrow account to be disbursed to EPA upon the effective date of the Agreement. If this method is used, accrued interest from the Past Response Costs date through the date the escrow account is created should be calculated and included in the escrow deposit.

numbers represent the Region (01–10), second 2 numbers represent the Region's Site/Spill Identification number], and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

12. At the time of payment, each Settling Party shall send notice that such payment has been made to:

[Insert name and address of Regional Attorney and/or Remedial Project Manager]

VI. Failure to Comply With Agreement

13. In the event that any payment required by Paragraph 10 is not made when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

14. If any amounts due to EPA under Paragraph 10 are not paid by the required date, Settling Parties shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 13, \$_____ per violation per day that such payment is late.

[[[Note: If the Agreement includes any non-payment obligations for which a stipulated penalty is due, insert, "If Settling Parties do not comply with [reference sections containing non-payment obligations], Settling Parties shall pay to EPA, as a stipulated penalty, \$_____ per violation per day of such noncompliance." Escalating penalty payment schedules may be used for payment or non-payment obligations.]]

15. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made in accordance with Paragraphs 11 and 12.

16. Penalties shall accrue as provided above regardless of whether EPA has notified the Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after performance is due, or the day a violation occurs, and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

17. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Parties' failure to comply with the requirements of this Agreement, any Settling Party who fails

or refuses to comply with any term or condition of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

18. The obligations of Settling Parties to pay amounts owed to EPA under this Agreement are joint and several. In the event of the failure of any one or more Settling Parties to make the payments required under this Agreement, the remaining Settling Parties shall be responsible for such payments.

19. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement.

VII. Covenant Not To Sue By EPA

20. Except as specifically provided in Paragraph 21 (Reservations of Rights by EPA), EPA covenants not to sue Settling Parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Reimbursement of Response Costs) and Section VI, Paragraphs 13 (Interest on Late Payments) and 14 (Stipulated Penalty for Late Payment). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

VIII. Reservations of Rights By EPA

21. The covenant not to sue by EPA set forth in Paragraph 20 does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties with respect to all other matters, including but not limited to:

- a. liability for failure of Settling Parties to meet a requirement of this Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural

resources, and for the costs of any natural resource damage assessments.

22. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

IX. Covenant Not To Sue By Settling Parties

23. Settling Parties agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.⁴

24. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

X. Effect of Settlement/Contribution Protection

25. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA and Settling Parties each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence

⁴ The settlement should, wherever possible, release or resolve any claims by settling parties against the United States related to the site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Settlement of any federal liability will require additional revisions to this document, and model language will be provided separately. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be deleted and private parties be allowed to reserve their rights.

relating in any way to the Site against any person not a Party hereto.

26. EPA and Settling Parties agree that the actions undertaken by Settling Parties in accordance with this Agreement do not constitute an admission of any liability by any Settling Party. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

27. The Parties agree that Settling Parties are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs.

28. Each Settling Party agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

29. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Parties shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Paragraph 20.

XI. Retention of Records

30. Until ____ years after the effective date of this Agreement, each Settling Party shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate

in any manner to response actions taken at the Site or to the liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

31. After the conclusion of the document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA, Settling Parties shall deliver any such records or documents to EPA. Settling Parties may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to EPA in redacted form to mask the privileged information only. Settling Parties shall retain all records and documents that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Parties' favor.

32. By signing this Agreement, each Settling Party certifies individually that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability

regarding the Site, after notification of potential liability or the filing of a suit against the Settling Party regarding the Site; and

c. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e) [insert, if applicable, ", and Section 3007 of the Resource, Conservation and Recovery Act, 42 U.S.C. § 6927."]

XII. Notices and Submissions

33. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Parties.

As to EPA:

[Insert names and addresses of EPA Regional contacts, usually the ORC attorney and the RPM or Project Coordinator]

As to Settling Parties:

[Insert name of one person who will serve as the contact for all Settling Parties]

XIII. INTEGRATION/[APPENDICES]

34. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement. [The following appendices are attached to and incorporated into this Agreement: "Appendix A is ____; etc."]

XIV. Public Comment

35. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

_____. *Attorney General Approval*

[Note: This section should be used if Attorney General approval is required for this settlement because total past and projected response costs at the site will exceed \$500,000, excluding interest, and the agreement compromises a claim (*i.e.*, recovers less than 100% of past costs, including accrued interest). If Attorney General approval is required, the Region should consult with DOJ during the negotiations process and should obtain written DOJ approval of the settlement before publishing notice of the proposed agreement in the Federal Register pursuant to Section 122(i) of CERCLA. The Region should discuss with DOJ any significant comments received during the public comment period. If the Region believes that the agreement should be modified based upon public comment, the Region should discuss with the DOJ attorney assigned to the case whether the proposed change will require formal re-approval by DOJ. If this section is used, renumber the Effective Date section and paragraph.]

[[_____. The Attorney General or [his/her] designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).]]

XV. Effective Date

36. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 35 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

It is so agreed:
U.S. Environmental Protection Agency

By: _____
[Name]
Regional Administrator, Region ____

[Date]

[Note: If the Regional Administrator has redelegated authority to enter into Section 122(h) settlements, insert name and title of delegated official.]

The undersigned settling party enters into this Agreement in the matter of [insert U.S. EPA docket number], relating to the [insert site name and location]:

For Settling Party:

[Name]

[Address]

By: _____
[Name]

[Date]

[FR Doc. 95-29745 Filed 12-5-95; 8:45 am]

BILLING CODE 5650-50-P

[FRL-5340-4]

National Pollutant Discharge Elimination System (NPDES); Preparation of Draft General Permit for the States of Maine, Massachusetts, and New Hampshire

AGENCY: Environmental Protection Agency.

ACTION: Notice; Preparation of Draft NPDES General Permits—MAG070000, MEG070000, and NHG070000.

SUMMARY: The Regional Administrator of the six states of New England is issuing Notice of a Draft National Pollutant Discharge Elimination System (NPDES) General Permit for construction dewatering facilities in certain waters of the States of Maine, Massachusetts, and New Hampshire. This draft general NPDES Permit establishes notice of intent (NOI) requirements, effluent limitations, standards, prohibitions and management practices for the construction dewatering discharges.

Owners and/or operators of facilities discharging effluent from construction dewatering facilities will be required to submit to EPA, Region I, a notice of intent (NOI) to be covered by the appropriate general permit and will receive a written notification from EPA of permit coverage and authorization to discharge under the general permit.

The draft permit is based on an administrative record available for public review at Environmental Protection Agency, Region I, John F. Kennedy Federal Building, CMA. Boston, Massachusetts 02203.

The following **FACT SHEET AND SUPPLEMENTARY INFORMATION** section sets forth principal facts and the significant factual, legal, and policy questions considered in the development of the draft permits.

DATES: For comment period: Interested persons may submit comments on the draft general permits as part of the administrative record to the Regional Administrator of the six states of New England at the address given in the proceeding **SUMMARY** section no later than 30 days after the date of publication of the draft general permit in the Federal Register.

This general permit shall be effective when issued and will expire five years from the effective date.

For Further Information And Copies of Draft General NPDES Permit: Additional information concerning the draft permit may be obtained between the hours of 9:00 a.m. and 4:00 p.m. Monday through Friday excluding holidays from: Suproakash Sarker, Office

of Ecosystem Protection Massachusetts State Program, Environmental Protection Agency, J.F. Kennedy Federal Building, Boston, Massachusetts 02203, Telephone (617) 565-3573.

FACT SHEET AND SUPPLEMENTARY INFORMATION

I. Introduction

The Regional Administrator of the six states of New England is issuing draft general permit for effluent discharges from construction dewatering facilities to certain waters of the States of Maine, Massachusetts, and New Hampshire. Appendix A contains the draft general NPDES permit including Part II, Standard Conditions.

II. Coverage of General Permits

Section 301(a) of the Clean Water Act (the Act) provides that the discharge of pollutants is unlawful except in accordance with a National Pollutant Discharge Elimination System (NPDES) permit. Although such permits to date have generally been issued to individual discharges, EPA's regulations authorize the issuance of "general permits" to categories of discharges. (See 40 CFR § 122.28 48 FR 14146, April 1, 1983). EPA may issue a single, general permit to a category of point sources located within the same geographic area whose permits warrant similar pollutant control measures.

The Director of an NPDES permit program is authorized to issue a general permit if there are a number of point sources operating in a geographic area that:

1. Involve the same or substantially similar types of operations;
2. Discharge the same types of wastes;
3. Require the same effluent limitations or operating conditions;
4. Require the same or similar monitoring requirements; and
5. In the opinion of the Regional Administrator, are more appropriately controlled under a general permit than under individual permits.

Violations of a condition of a general permit constitutes a violation of the Clean Water Act and subjects the discharger to the penalties in Section 309 of the Act.

Any owner or operator authorized by a general permit may be excluded from coverage of a general permit by applying for an individual permit. This request may be made by submitting a NPDES permit application together with reasons supporting the request. The Director may require any person authorized by a general permit to apply for and obtain an individual permit. Any interested person may petition the Director to take